Supreme Court, U.S.
FILED
94 306 AUG 16 1994
OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1994

LEON E. HENDRICKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS W. FARLOW*
Counsel of Record for Petitioner
LOCKE REYNOLDS BOYD & WEISELL
1000 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204
(317) 237-3800

MICHAEL J. RUSNAK*
ROBERT W. WRIGHT
Co-Counsel for Petitioner

* Application for admissions filed August 15, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

74 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner, Leon E. Hendrickson, requests that the Court issue a Writ of Certiorari to review the following questions which were decided by the United States Court of Appeals for the Seventh Circuit:

I. Whether the United States Court of Appeals for the Seventh Circuit erred in holding that the voluntary payment of a forfeiture with substitute assets may never be considered as a factor in finding that a defendant demonstrated extraordinary acceptance of responsibility which would warrant a downward departure from the United States Sentencing Guidelines.

A. Whether the Seventh Circuit's approach to interpreting the Guidelines conflicts with the approach followed by other circuits.

B. Whether the Sentencing Commission considered the forfeiture of substitute assets in formulating the Guidelines.

C. Whether there is any difference for purposes of a departure between restitution and forfeiture of substitute assets pursuant to a plea agreement.

II. Whether the United States Court of Appeals for the Seventh Circuit erred in exercising jurisdiction and deciding the appeal despite the Government's failure to comply with 18 U.S.C. 3742(b).

TABLE OF CONTENTS

Page

Parties to the Proceeding and Designation of Corporate Relationships[1] ii

Table of Authorities iv

I. OPINIONS BELOW 1

II. JURISDICTION 2

III. STATUTES INVOLVED 2

IV. STATEMENT OF THE CASE 2

A. Summary of the facts 2

B. The proceedings below 4

V. REASONS FOR GRANTING THE WRIT 5

A. The Seventh Circuit erred in holding that a sentencing court may not depart downward from the applicable Guideline range based upon the agreement to pay and the payment of a substantial forfeiture of substitute assets pursuant to 18 U.S.C. § 982(b)(1)(A) 5

B. The Seventh Circuit erred in exercising jurisdiction over the appeal where the Government failed to comply with the requirements of 18 U.S.C. § 3742(b) 16

VI. CONCLUSION 21

---

[1] Pursuant to Sup. Ct. Rule 29.1, Petition states that he is an individual, that he owns Silver Towne as a sole proprietorship, and that none of the parties to this litigation are corporations.

TABLE OF CONTENTS – Continued

Page

APPENDIX

A. United States v. Hendrickson, 22 F.3d 170 (7th Cir. 1994).....App. 1

B. Order Denying Rehearing.....App. 16

C. Sentencing Order of the United States District Court, Southern District of Indiana App. 17

D. 18 U.S.C.S. App., U.S.S.G. 5K2.0 .....App. 26

E. 18 U.S.C.S. App., U.S.S.G. 3E1.1 .....App. 28

F. 18 U.S.C.S. App., U.S.S.G. 5E1.4 .....App. 31

G. 18 U.S.C. 3742(b).....App. 32

H. 18 U.S.C. 982 (a)(1), (b)(1,2) .....App. 33

I. 21 U.S.C. 853(a,p) .....App. 35

J. 18 U.S.C. 3553 (a,b) .....App. 37

K. 18 U.S.C.S. App., U.S.S.G. 1A(2) and (4)(b) App. 40

TABLE OF AUTHORITIES

Page

CASES

Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed 651 (1977) 18, 19

Carras v. Williams, 807 F.2d 1286 (6th Cir. 1986) 19

United States v. Bean, 18 F.3d 1367 (7th Cir. 1994) 13

United States v. Brown, 985 F.2d 478 (9th Cir. 1993) 7, 13

United States v. Carey, 895 F.2d 318 (7th Cir. 1990) 7, 13

United States v. Crook, 9 F.3d 1422 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1841, 128 L.Ed.2d 467 (1984) 8

United States v. Davis, 797 F. Supp. 672 (N.D. Ind. 1992) 13

United States v. DeFelippis, 950 F.2d 445 (7th Cir. 1991) 6

United States v. Franklin, 902 F.2d 501 (7th Cir. 1990), *cert. denied*, 498 U.S. 906, 111 S.Ct. 274, 112 L.Ed.2d 229 (1990) 15

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991) 7, 13

United States v. Gaskill, 991 F.2d 82 (3rd Cir. 1993) 9

United States v. Gonzalez, 970 F.2d 1095 (2nd Cir. 1992) 18

United States v. Hall, 943 F.2d 39 (11th Cir. 1991) 18

United States v. Hendrickson, 22 F.3d 170 (7th Cir. 1994) ..... *passim*

United States v. Lieberman, 971 F.2d 989 (3rd Cir. 1992) 7, 13

United States v. Merritt, 988 F.2d 1298 (2nd Cir. 1993), *cert. denied*, 113 S.Ct. 2933, 124 L.Ed.2d 683 (1993) 9, 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Naud, 830 F.2d 768 (7th Cir. 1987) 20

United States v. Petti, 973 F.2d 1441 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1859, 123 L.Ed.2d 480 (1993) 18

United States v. Providence Journal Co., 485 U.S. 693, 108 S. Ct. 1502, 99 L.Ed.2d 785 (1988) 17

United States v. Shirk, 981 F.2d 1382 (3rd Cir. 1992), *vacated and remanded on other grounds*, 114 S.Ct. 873, 127 L.Ed.2d 70 (1994) 8

United States v. Smith, 1994 WL 321513 (D.C. Cir. 1994) 8

United States v. Smith, 910 F.2d 326 (6th Cir. 1990) 18

United States v. Spilotro, 884 F.2d 1003 (7th Cir. 1989) 19

STATUTES

18 U.S.C. § 982 (Supp. V 1993) 2, 4, 13

18 U.S.C. § 982(b)(1)(A) (Supp. V 1993) 4, 5, 11, 12

18 U.S.C. § 982(b)(2) (Supp. V 1993) 12

18 U.S.C. § 1957 (1988 & Supp. IV 1992) 4

18 U.S.C. § 3231 (1988) 2

18 U.S.C. § 3553(a) (1988) 2

18 U.S.C. § 3553(b) (1988) 2, 6

18 U.S.C. § 3742 (1988 & Supp. V 1993) 16

18 U.S.C. § 3742(b) (1988 & Supp. V 1993) 16, 17, 18, 19, 20, 21

18 U.S.C. § 3742(b)(1) (1988) 17

18 U.S.C. § 3742(b)(2) (1988) 17

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 3742(b)(3) (1988) 17

18 U.S.C.S. App., U.S.S.G. § 1A(2) 2

18 U.S.C.S. App., U.S.S.G. § 1A(4)(b) 2

18 U.S.C.S. App., U.S.S.G. § 3E1.1 (Law. Co-op 1994) 2

18 U.S.C.S. App., U.S.S.G. § 3E1.1(a) (Law. Co-op 1994) 7

18 U.S.C.S. App., U.S.S.G. § 5E1.4 (Law. Co-op 1994) 2, 8, 10, 12

18 U.S.C.S. App., U.S.S.G. § 5H (Law. Co-op 1994) 10, 11

18 U.S.C.S. App., U.S.S.G. § 5H1.1 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5H1.2 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5H1.3 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5H1.4 (Law. Co-op 1994) 9, 11

18 U.S.C.S. App., U.S.S.G. § 5H1.5 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5H1.6 (Law. Co-op 1994) 9, 11

18 U.S.C.S. App., U.S.S.G. § 5H1.10 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5H1.11 (Law. Co-op 1994) 9, 11

18 U.S.C.S. App., U.S.S.G. § 5H1.12 (Law. Co-op 1994) 11

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C.S. App., U.S.S.G. § 5K (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5K1.1 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5K1.2 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5K2.0 (Law. Co-op 1994) 2, 6, 7

18 U.S.C.S. App., U.S.S.G. § 5K2.1 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5K2.2 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5K2.3 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5K2.4 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5K2.5 (Law. Co-op 1994) 11

18 U.S.C.S. App., U.S.S.G. § 5K2.6 (Law. Co-op 1994) 11

21 U.S.C. § 853(p) (1988) 2, 12, 14

28 U.S.C. § 994(a) (1988) 17

28 U.S.C. § 1254(1) (1988) 2

28 U.S.C. § 1291 (1988) 2

I.R.C. § 6050I (1986) 3

P.L. 100-690, Section 6464 (1988) 12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Seventh Circuit Rule 28(c) 20
FRAP 28 20
FRAP 28(a)(2) 20
Sup. Ct. Rule 29.1 ii

No. _____

In The

Supreme Court of the United States

October Term, 1994

LEON E. HENDRICKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

This petition seeks a writ of certiorari with respect to a decision by the United States Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit"), *United States v. Hendrickson*, 22 F.3d 170 (7th Cir. 1994). The decision is reprinted as Appendix A. That decision reversed the sentencing decision of the United States District Court for the Southern District of Indiana, which granted petitioner Leon E. Hendrickson a downward departure from the Sentencing Guidelines. The district court's sentencing order is reprinted as Appendix C.

II. JURISDICTION

The district court's jurisdiction was based upon 18 U.S.C. § 3231 (1988). The jurisdiction of the United States Court of Appeals for the Seventh Circuit was based upon 28 U.S.C. § 1291 (1988). The decision of the Court of Appeals was rendered on April 20, 1994. (*See* Appendix A). Petitioner timely filed a petition for rehearing with suggestion for rehearing in banc. The Court of Appeals denied petitioner's petition for rehearing on May 18, 1994. (*See* Appendix B). Accordingly, this Petition is timely filed within 90 days of the denial of rehearing.

The jurisdiction of this Court to review the Order on petition for certiorari rests upon 28 U.S.C. § 1254(1) (1988).

III. STATUTES INVOLVED

The relevant statutes in this case are as follows: 18 U.S.C.S. App., U.S.S.G. § 5K2.0 (Law. Co-op 1994), attached hereto as Appendix D; 18 U.S.C.S. App., U.S.S.G. § 3E1.1, attached hereto as Appendix E; 18 U.S.C.S. App., U.S.S.G. § 5E1.4, attached hereto as Appendix F; 18 U.S.C. § 3742(b) (1988 & Supp. V 1993), attached hereto as Appendix G; 18 U.S.C. § 982 (Supp. V 1993), attached hereto as Appendix H; 21 U.S.C. § 853(p) (1988), attached hereto as Appendix I; 18 U.S.C. § 3553(a,b) (1988), attached hereto as Appendix J; 18 U.S.C. § 1A(2) and (4)(b), attached hereto as Appendix K.

IV. STATEMENT OF THE CASE

A. Summary of the Facts.

The facts underlying petitioner's guilty plea and sentencing generally are recited in the Seventh Circuit's decision. (*See* Appendix A). Petitioner, Leon E. Hendrickson

("Hendrickson"), owns and operates Silver Towne, a precious metals and coin dealership, in Winchester, Indiana. Silver Towne is one of the largest coin dealerships in the nation and a leader in gold bullion sales. Hendrickson often attended trade shows as part of his business.

At one such trade show, Hendrickson met Robert McGuinn, a purported gold dealer. McGuinn purchased from Hendrickson approximately $50,000 worth of gold for which McGuinn tendered cash in a brown paper bag. McGuinn subsequently engaged in ten more transactions with Silver Towne over the course of three months in early 1990.[2] The transactions totaled approximately $1,094,745 consisting of eleven cash payments varying in size between $28,000 and $140,000. Cash shipments from McGuinn often would arrive at Silver Towne in pails lined with garbage bags and would consist of currency of small denominations.

Hendrickson did not retain any of the proceeds of the money laundering transactions, and Hendrickson and Silver Towne made a profit of less than $10,000 on the entire deal, which reflected Silver Towne's normal commission. Neither Hendrickson nor any Silver Towne employee filed the Internal Revenue Service ("IRS") Forms 8300 as

---

[2] All the transactions between McGuinn and Silver Towne for which Hendrickson was charged were negotiated by David Hendrickson, Leon Hendrickson's son, who received an agreed-upon 12-month sentence for his role in the offense. The actual completion of the Forms 8300 for Silver Towne was normally performed by Stanley Hendrickson, the comptroller for Silver Towne. Leon Hendrickson, however, was the owner of Silver Towne and accepted full responsibility for all transactions at Silver Towne and for the failure to file any required forms.

required by I.R.C. § 6050I (1986) for these cash transactions. An IRS audit and investigation of Silver Towne in November 1990 revealed Silver Towne's failure to file the required Forms 8300 for the cash transactions involving McGuinn.[3]

B. The proceedings below.

Hendrickson was charged with eight counts of money laundering in violation of 18 U.S.C. § 1957 and eight counts of criminal forfeiture pursuant to 18 U.S.C. § 982. Subsequently, Hendrickson filed a petition to enter a plea of guilty, and the parties filed a memorandum of plea agreement. As part of the plea agreement, Hendrickson agreed to pay a forfeiture of $742,555, despite the fact that McGuinn received gold in exchange for his payment and despite the fact that Silver Towne made less than $10,000 profit from the transactions. There is no dispute that the $742,555 forfeiture involved payment of substitute assets pursuant to § 982(b)(1)(A). Following a hearing regarding Hendrickson's guilty plea and the plea agreement, the district court adjudged Hendrickson guilty.

At the sentencing hearing, the district court adopted the findings of the presentence investigation report and, based upon an offense level of 18 and a criminal history category of I, found that the applicable Guideline range

---

[3] It was later discovered that McGuinn was an agent for an international money laundering operation linked to a Columbian cocaine cartel. The Government agreed that petitioner was not aware that the money used to pay for the gold was derived from the drug trade.

for incarceration was twenty-seven to thirty-three months. However, in response to a motion by Hendrickson, the district court made a downward departure from the applicable Guideline range based upon a finding of extraordinary acceptance of responsibility. That finding was based, in part, upon Hendrickson's agreement to pay the forfeiture and tender of payment of the entire $742,555 forfeiture just prior to the hearing. The district court made a downward departure of six levels from the applicable Guideline range and sentenced Hendrickson to five months incarceration, five months home detention, and two years of supervised release.

The Seventh Circuit vacated Hendrickson's sentence and remanded to the district court for resentencing.

V. REASONS FOR GRANTING THE WRIT

A. The Court of Appeals erred in holding that a sentencing court may not depart downward from the applicable Guideline range based upon the agreement to pay and the payment of a substantial forfeiture of substitute assets pursuant to 18 U.S.C. § 982(b)(1)(A).

The Seventh Circuit held that payment of a forfeiture mandated by statute is not voluntary and cannot be a ground for a finding of extraordinary acceptance of responsibility. *Hendrickson*, 22 F.3d at 177. The Seventh Circuit's rationale was that "[i]t is plain from the language of section 982(b)(2) that the onerous nature of forfeiture of substitute assets was considered by both Congress and the Sentencing Commission." *Id.* at 175. In so ruling, The Seventh Circuit erroneously decided a

question of federal law which has not been, but should be, settled by the Supreme Court.[4] The approach of the Seventh Circuit conflicts not only with the Commission's stated view of Guidelines departures but also with the Guidelines departure decisions of other courts of appeals.

The Seventh Circuit correctly recognized in *Hendrickson* that extraordinary acceptance of responsibility may be a ground for departure. The drafters of the Guidelines plainly recognized that departures would play a necessary role under the Guidelines:

> Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. . . .

18 U.S.C.S. App., U.S.S.G. § 5K2.0, Grounds for Departure (Policy statement). (citation omitted). Thus, a court may depart downward where it finds that there exists a mitigating circumstance to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described. 18 U.S.C. § 3553(b).

Courts have consistently recognized that extraordinary acceptance of responsibility is a valid basis for a

---

[4] This Petition involves the question of whether the district court's stated grounds for departure are of a kind that appropriately may be relied upon to justify a departure, which is subject to *de novo* review. *United States v. DeFelippis*, 950 F.2d 445, 447 (7th Cir. 1991).

departure. *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990); *United States v. Lieberman*, 971 F.2d 989 (3rd Cir. 1992); *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991). As explained by the Ninth Circuit Court of Appeals,

> The mere existence of section 3E1.1(a) does not preclude the sentencing court from making an additional departure in the case where the defendant manifests an extraordinary acceptance of responsibility. "[T]he court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines . . . if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate." U.S.S.G. § 5K2.0 (Policy Statement) We conclude, therefore, that the district court could have departed from the recommended sentence range if it had determined that the two point reduction provided in section 3E1.1 did not adequately reflect the degree to which [the defendant] accepted responsibility for his conduct.

United States v. Brown, 985 F.2d 478, 482 (9th Cir. 1993).

The Seventh Circuit, however, eliminated these bases for departure in forfeiture cases by unconditionally concluding that the payment of a grossly excessive, punitive and burdensome forfeiture of substitute assets pursuant to a plea agreement may not be considered as a factor in finding an extraordinary acceptance of responsibility. The Seventh Circuit held that a court may not consider the payment of a statutory forfeiture as a factor in granting a departure because the Sentencing Commission adequately considered both the possibility of statutory forfeiture and degree of hardship a forfeiture could work when

constructing the Guidelines. *Hendrickson*, 22 F.3d at 174. The Seventh Circuit held that forfeitures had been adequately considered by the Sentencing Commission because Section 5E1.4 of the Guidelines explicitly states that "[f]orfeiture is to be imposed upon a convicted defendant as provided by statute." *Id.* Thus, the Seventh Circuit concluded that forfeitures categorically could not be considered in determining whether a departure is warranted in any case.[5]

The Seventh Circuit's approach conflicts with the approach followed by other circuits and is contrary to the instructions of the Sentencing Commission. As the United States Court of Appeals for the District of Columbia Circuit has noted, the Sentencing Commission has imposed very few categorical limits on what may qualify as a mitigating circumstance justifying a departure. *United States v. Smith*, 1994 WL 321513, at 4 (D.C. Cir. 1994).

---

[5] Two other circuits have addressed a similar issue. In *United States v. Shirk*, 981 F.2d 1382 (3rd Cir. 1992), *vacated and remanded on other grounds*, 114 S.Ct. 873, 127 L.Ed.2d 70 (1994), the Third Circuit reversed a departure based upon a defendant's "exposure" to a forfeiture. Similarly, in *United States v. Crook*, 9 F.3d 1422 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1841, 128 L.Ed.2d 467 (1984), the Ninth Circuit reversed a departure based upon the finding that the defendant was subject to a substantial forfeiture. The Seventh Circuit incorrectly broadened the rulings in *Shirk* and *Crook*, contrary to the Guidelines, to unconditionally bar any consideration of the voluntary payment of a forfeiture of substitute assets as a factor in determining that a departure is warranted.

The Guidelines state:

> Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, *whether or not mentioned anywhere else in the guidelines,* that could constitute grounds for departure in an unusual case.

Id. (quoting 18 U.S.C. App., U.S.S.G. §1A4(b)) (emphasis added). The court in *Smith* noted that elsewhere the Sentencing Commission states more simply: " 'If . . . a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range.' " *Id.* (quoting 18 U.S.C. App., U.S.S.G. §1A2). Other circuits have followed the approach established by the Guidelines and have held that absent a specific exemption that the Commission has stated cannot be used as the basis for a departure, *any factor* can justify a departure if it is of a kind or present to a degree not adequately taken into account by the Commission. *United States v. Merritt,* 988 F.2d 1298, 1310 n.8 (2nd Cir. 1993), *cert. denied,* 113 S.Ct. 2933, 124 L.Ed.2d 683 (1993) (citing cases); *United States v. Gaskill,* 991 F.2d 82 (3rd Cir. 1993). The Supreme Court should grant a writ of certiorari to settle this conflict among the circuits and affirmatively hold that unless specifically excluded by the Commission as a factor which cannot be considered, any

factor can be considered as a ground for departure in extraordinary or atypical situations.

The Seventh Circuit erred in finding that the Sentencing Commission adequately considered both the possibility of a statutory forfeiture and the degree of hardship a forfeiture could work when drafting the Guidelines. The Seventh Circuit based its erroneous conclusion upon the following single sentence in the Guidelines, which alone mentions forfeiture: "Forfeiture is to be imposed upon a convicted defendant as provided by statute." *Hendrickson*, 22 F.2d at 175 (quoting 18 U.S.C.S. App., U.S.S.G. § 5E1.4). The Seventh Circuit erroneously expands the single sentence in § 5E1.4 to mean that a forfeiture was to be imposed in addition to, not in lieu of, incarcerartion. *Id.* Nothing in this single sentence suggests that payment of a substantial forfeiture of substitute assets, which even the Government characterized as extremely punitive and burdensome (Appendix to Govt.'s Appellant Brief, at 47), pursuant to a plea agreement, cannot be the basis for a finding of extraordinary acceptance of responsibility which would warrant a downward departure. Moreover, the forfeiture payment in this case was not made "in lieu of" incarceration. Indeed, the district court imposed ten months of incarceration (five months of which were served by home confinement).

In order for a court to conclude that the Sentencing Commission considered a certain factor in constructing the Guidelines, there must be some explicit expression in the Guidelines that the issue was indeed considered. The Specific Offender Characteristics set forth in § 5H are a clear example of the Sentencing Commission's full consideration of certain factors relevant to sentencing. In

§ 5H, the Commission explicitly stated that the following are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range: age (§ 5H1.1); education and vocational skills (§ 5H1.2); mental and emotional conditions (§ 5H1.3); physical condition, including drug or alcohol dependence or abuse (§ 5H1.4); employment record (§ 5H1.5); family ties and responsibilities and community ties (§ 5H1.6); race, sex, national origin, creed, religion, and socio-economic status (§ 5H1.10); military, civic, charitable, or public service (§ 5H1.11); and lack of guidance as a youth. (§ 5H1.12).

Another example of the Commission's consideration of sentencing factors is found in § 5K, which explicitly enumerates various factors which a court may rely upon to depart downward or upward from the applicable guideline range. These factors include: substantial assistance to authorities (§ 5K1.1); refusal to assist (§ 5K1.2); death (§ 5K2.1); physical injury (§ 5K2.1); physical injury (§ 5K2.2); extreme psychological injury (§ 5K2.3); abduction or unlawful restraint (§ 5K2.4); property damage or loss (§ 5K2.5); weapons and dangerous instrumentalities (§ 5K2.6), as well as others. Even in these circumstances, in an extraordinary or atypical case, a departure can be granted. *Merritt,* 988 F.2d at 1309-1310.

In both § 5H and § 5K, the Commission specifically set forth and explained these various sentencing factors. Thus, these factors were considered by the Commission. However, the Guidelines provide no indication whether the Commission considered, let alone fully considered, the payment of a substantial forfeiture of substitute assets pursuant to 18 U.S.C. § 982(b)(1)(A) in formulating the Guidelines for money laundering or criminal forfeiture.

Rather, the Commision merely restated the obvious: forfeiture is to be imposed as provided by statute. § 5E1.4. This single sentence does not demonstrate that the Commission fully considered forfeiture with regard to departures.

In addition, it would have been impossible for the Commission to have fully considered whether the payment of a forfeiture of substitute assets pursuant to 18 U.S.C. § 982(b)(1)(A) was a relevant sentencing factor for departures. The Guidelines became effective November 1, 1987. However, Congress did not incorporate the substitute assets provision of 21 U.S.C. § 853(p) into 18 U.S.C. § 982(b)(1)(A) and (b)(2) until November 18, 1988. P.L. 100-690, Section 6464 (1988). The Sentencing Commission did not, and indeed could not, consider the nature of a forfeiture of substitute assets when constructing the Guidelines.

In view of the foregoing, the Seventh Circuit erred in determining that the Commission fully considered forfeiture of substitute assets pursuant to 18 U.S.C. § 982(b)(1)(A) in formulating the Guidelines. Thus, the district court correctly determined that payment of the forfeiture was properly considered as a factor in finding extraordinary acceptance of responsibility and warranted a downward departure from the Guidelines range.

The Seventh Circuit also erred in concluding that the quality of voluntariness that forfeiture lacks makes it unsuitable as a ground for finding extraordinary acceptance of responsibility. *Hendrickson*, 22 F.3d at 176. The court did recognize the apparently consistent belief among circuits that the payment of restitution may, under

some circumstances, demonstrate an extraordinary acceptance of responsibilty which warrants a downward departure. *See, e.g., United States v. Bean*, 18 F.3d 1367 (7th Cir. 1994); *United States v. Brown*, 985 F.2d 478 (9th Cir. 1993); *United States v. Lieberman*, 971 F.2d 989 (3rd Cir. 1992); *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991); *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990); *United States v. Davis*, 797 F. Supp. 672 (N.D. Ind. 1992). The Seventh Circuit, however, concluded that the payment of a forfeiture, unlike restitution, can never be considered voluntary.

The Seventh Circuit's reasoning ignores the significant difference between forfeiting of the assets directly involved in money laundering, and forfeiting of substitute assets which were permitted by amendments to § 982. The disgorgement of the assets which are directly involved in an illegal transaction, such as the actual proceeds from a sale of drugs, may not involve any voluntary conduct by the defendant. Substitute assets, however, are assets which were legally obtained by the defendant, which the defendant was legally entitled to possess prior to the time of forfeiture, and which the Government may likely encounter a difficult time obtaining. In such sense, a defendant's voluntary efforts to arrange payment of those assets is similar to a defendant's efforts to voluntarily make payment of restitution.

Moreover, it cannot properly be maintained that the forfeiture of substitute assets in this case was involuntary, and therefore somehow different from restitution which would warrant a departure for extraordinary acceptance

of responsibility. Hendrickson agreed to pay the forfeiture of substitute assets prior to the district court's adjudication of his guilt. The plea agreement was reached prior to the presentation of the plea to the district court and its finding of guilt. This is no different than voluntary payment of restitution warranting a departure.

The Seventh Circuit lost sight of the voluntary nature of Hendrickson's payment of the forfeiture of substitute assets. In order to prove that a defendant must forfeit substitute assets, the Government would first have to prove the following:

1. Defendant was convicted of money laundering;

2. Certain property was involved in the offense;

3. The property included in the offense was no longer available for forfeiture; and

4. There were no innocent owners, creditors or lienholders.

See 21 U.S.C. § 853(p). By voluntarily agreeing to pay, and by paying, the nearly $750,000 forfeiture of substitute assets, Hendrickson allowed the Goverment to shortcut these significant proof requirements. The voluntary nature of Hendrickson's payment demonstrates extraordinary acceptance of responsibility which warranted a downward departure.

The Seventh Circuit's decision was based, at least in part, upon its misconception that a departure based upon the payment of a forfeiture would permit the rich to buy their way out of prison. Hendrickson never claimed that an agreement to forfeit property automatically entitles a defendant to a departure. Clearly, depending on the facts

and circumstances, payment of a forfeiture will not constitute acceptance, or extraordinary acceptance, of responsibility in all cases. *See United States v. Franklin*, 902 F.2d 501, 505-506 (7th Cir. 1990), *cert. denied*, 498 U.S. 906, 111 S.Ct. 274, 112 L.Ed.2d 229 (1990) (defendant not entitled to a reduction for acceptance of responsibility based upon his agreement to forfeit property, where that property had already been seized by and was in the possession of the government, where the district court found that the defendant's actions were designed to lessen his punishment and were not as a result of any true remorse for his crimes, and where the defendant continued to deal in cocaine while out on bond in the case). Thus, it is apparent that the district court, and not the appellate court, is the proper forum for a determination of whether a defendant's payment of a forfeiture results from an improper motive or from a genuine acceptance of responsibility.

The district court found that Hendrickson's payment of the entire forfeiture amount, immediately prior to sentencing, was an unusual circumstance demonstrating Hendrickson's extraordinary acceptance of responsibility. It is unusual both because of the fact that is was paid and because it was disproportionate to the profit. As the court noted, even the U.S. Attorney "characterized the nearly $750,000 payment that [Hendrickson] made as extremely punitive and burdensome." (Appendix to Govt. Appellant's Brief, at 47). The court noted "the impact of that amount of payment on [Hendrickson] individually and on [his] business that [he has] spent basically a lifetime building . . . ." (*Id.* at 47). This amount was the full amount charged in the indictment against Hendrickson. (*Id.* at 20). In order to pay this amount at the time of

sentencing, Hendrickson made the sacrifice of selling a collection that he had been building for 40 years as well as borrowing over $290,000, which he was required to pay back in March, 1994. (Supp. App. to Appellee's Brief, at 30). Hendrickson also made the payment immediately prior to the sentencing hearing, even though the terms of the plea agreement would have permitted the court to allow him up to three years to make the payment. (*Id.* at 110).

The Seventh Circuit's blanket exclusion of any consideration of a defendant's voluntary payment of a forfeiture of substitute assets is contrary to the Guidelines. As the forfeiture provisions enacted by Congress become subject to increasing abuse in the manner in which they are employed, it is imperative that district courts have guidance regarding the interplay between the forfeiture provisions and the Sentencing Guidelines. This Court should accept certiorari to consider this new and important area of federal law.

B. The Seventh Circuit erred in exercising jurisdiction over the appeal where the Government failed to comply with the requirements of 18 U.S.C. § 3742(b).

The Seventh Circuit also erroneously decided a question of federal law regarding appellate jurisdiction which has not been, but should be, settled by this Court. The Seventh Circuit, after recognizing that the Government's right to appeal rested upon 18 U.S.C. § 3742, decided that the Government need not comply with the express and

unambiguous requirements of that statute in order to prosecute an appeal.

The Government appealed from a final judgment in a criminal case pursuant to 18 U.S.C. §§ 3742(b)(1), (2) and (3). That statute provides, in pertinent part:

> (b) Appeal by the Government. The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);
>
> (3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, . . .

18 U.S.C. § 3742(b). The statute also expressly states that "[t]he Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." *Id. Cf. United States v. Providence Journal Co.*, 485 U.S. 693, 699 n.5, 108 S.Ct. 1502, 1506 n.5, 99 L.Ed.2d 785 (1988).

The Seventh Circuit, in a footnote, rewrote § 3742(b) to eliminate the requirement of personal approval.

> The United States is authorized to appeal this matter pursuant to 18 U.S.C. § 3742(b). Appellee, however, contends that this Court lacks

> jurisdiction over this appeal because the government has not demonstrated that it received approval to appeal from the Attorney General, Solicitor General, or a designated deputy solicitor general as required by 18 U.S.C. § 3742(b). Appellee's contention is without merit. The approval requirement contained in 18 U.S.C. § 3742(b) is not a jurisdictional requirement. *United States v. Gonzalez*, 970 F.2d 1095, 1102 (2nd Cir. 1992); *United States v. Hall*, 943 F.2d 39, 41 (11th Cir. 1991); *United States v. Smith*, 910 F.2d 326, 328 (6th Cir. 1990). Accordingly, this Court would not be divested of jurisdiction in this case even if the government failed to secure approval for its appeal as required by 18 U.S.C. § 3742(B).

Hendrickson, 22 F.3d at 171, n.1.

Other circuits have similarly held that the approval required by 3742(b) is not jurisdictional. *See, e.g., United States v. Hall*, 943 F.2d 39, 41 (11th Cir. 1991); *United States v. Petti*, 973 F.2d 1441, 1446-47 n.9 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1859, 123 L.Ed.2d 480 (1993). However, these cases involved the issue of *when* the Government obtained the required approval and not whether that approval had been obtained at all. In all of the cases relied upon by the Seventh Circuit in reaching its conclusion, the Government supplied the appellate court with proof that it had in fact obtained the required personal approval.

The Seventh Circuit erred in concluding that the Government's failure to comply with the requirements of 18 U.S.C. § 3742(b) did not divest the Court of jurisdiction. The right to appeal in criminal cases is purely a creature of statute. *Abney v. United States*, 431 U.S. 651,

657, 97 S.Ct. 2034, 2038, 52 L.Ed 651 (1977). The Government may appeal a judgment in a criminal case only when expressly authorized by Congress. *United States v. Spilotro*, 884 F.2d 1003, 1005 (7th Cir. 1989). In order to exercise a statutory right to appeal, one must come within the terms of the applicable statute. *Abney*, 431 U.S. at 657, 97 S.Ct. at 2038.

The Seventh Circuit, contrary to the principles enunciated in *Abney* and *Spilotro*, concluded that it would not be divested of jurisdiction even if the Government failed to secure approval for its appeal as required by 18 U.S.C. § 3742(b). *Hendrickson*, 22 F.3d at 171, n.1. In other words, the Seventh Circuit reached the perplexing conclusion that the approval expressly and unambiguously required by § 3742(b) is not required.

The Seventh Circuit's conclusion that the approval required by § 3742(b) is not jurisdictional is based upon the assumption that a court which obtains jurisdiction when the notice of appeal is filed cannot be subsequently divested of jurisdiction. Circumstances occurring after the notice of appeal is filed may divest the court of jurisdiction. For example, a case may become moot, thereby depriving the appellate court of jurisdiction. *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986). Similarly, if the Government fails to obtain the approval required by § 3742(b), it may not further prosecute the appeal. Absent the Government's authority to prosecute the appeal, the appellate court loses jurisdiction. Thus, the Seventh Circuit's conclusion that it was not divested of jurisdiction because of the Government's failure to comply with § 3742(b) is erroneous and should be reversed.

The burden of establishing jurisdiction was upon the Government, as appellant. Federal Rule of Appellate Procedure 28 states that the brief of the appellant must contain a statement of subject matter and appellate jurisdiction. That statement must include "a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction . . . . " FRAP 28(a)(2). The Seventh Circuit, in interpreting Circuit Rule 28, has previously held that:

> The requirements of the rule are simple, yet the information required, as evidenced by this case, is important in determining whether an appeal is properly before this court. Although the clerk's office inadvertently accepted these briefs for filing, litigants in this court are forewarned that briefs which do not comply with our rules will not be accepted.

United States v. Naud, 830 F.2d 768, 769 (7th Cir. 1987).

The Government did not state in its Brief of Appellant that it had obtained the approval required by § 3742(b). There is nothing in the record to support a finding of that approval. Petitioner, as required by Circuit Rule 28(c), indicated that neither the Government's Brief of Appellant nor the record indicated that the Government had obtained the approval required by § 3742(b). (Brief of Defendant-Appellee, pp. 1-2). In fact, petitioner stated, "If the Government has already obtained the required approval, it should inform the Court of that fact." *Id.* at p. 2, n.1.

The Government's reply brief contained no statement that the approval required by § 3742(b) had been

obtained. Although the Government filed a supplemental appendix with its reply brief, that appendix does not contain any proof that the approval had been obtained. Further, the Government made no statement at oral argument that the approval had been obtained. The record clearly indicates that the Seventh Circuit decided this case even though nothing in the record indicates that the Government complied with § 3742(b), the statute which the Government relies upon as the basis for its right to appeal. The Government's appeal should have been dismissed.

V. CONCLUSION

Petitioner, Leon E. Hendrickson, requests that this Court grant the petition for writ of ceriorari and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

THOMAS W. FARLOW
Counsel of Record for Petitioner
LOCKE REYNOLDS BOYD & WEISELL
1000 Capital Center South
201 North Illinois Street
Indianapolis, IN 46204

MICHAEL J. RUSNAK
ROBERT W. WRIGHT
Co-counsel for Petitioner

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

Leon E. HENDRICKSON,
Defendant-Appellee.

No. 93-2981.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 16, 1994.

Decided April 20, 1994.

Rehearing and Suggestion for Rehearing En Banc Denied May 18, 1994.

Defendant pleaded guilty in the United States District Court for the Southern District of Indiana, Sarah Evans Barker, Chief Judge, to money laundering and criminal forfeiture. The United States appealed sentence. The Court of Appeals, McDade, District Judge, sitting by designation, held that payment of mandatory forfeiture can never be the basis for finding extraordinary acceptance of responsibility warranting two-level reduction in offense level under Sentencing Guidelines.

Vacated and remanded.

James M. Warden, Asst. U.S. Atty., Donna Eide (argued), Office of U.S. Atty., Indianapolis, IN, for plaintiff-appellant.

Thomas W. Farlow (argued), Robert W. Wright, Michael J. Rusnak, Locke, Reynolds, Boyd & Weisell, Indianapolis, IN, for defendant-appellee.

Before EASTERBROOK and MANION, Circuit Judges, and McDADE, District Judge.*

McDADE, District Judge.

Appellant, the United States of America ("the government"), appeals from the sentence imposed upon Appellee, Leon Hendrickson ("Hendrickson"), by the district court pursuant to the United States Sentencing Guidelines ("U.S.S.G." or "the Guidelines").[1] Hendrickson entered into a plea agreement with the government and pled guilty to eight counts of money laundering, 18 U.S.C. § 1957, and eight counts of criminal forfeiture, 18 U.S.C. § 982. Although the Guidelines dictated that Hendrickson be sentenced to between twenty-seven and thirty-three months in prison, pursuant to U.S.S.G. § 5K2.0 the district court made a downward departure of six levels from the guideline range and sentenced Hendrickson to five months' imprisonment,

---

* Hon. Joe Billy McDade of the Central District of Illinois, sitting by designation.

[1] The United States is authorized to appeal this matter pursuant to 18 U.S.C. § 3742(b). Appellee, however, contends that this Court lacks jurisdiction over this appeal because the government has not demonstrated that it received approval to appeal from the Attorney General, Solicitor General or a designated deputy solicitor general as required by 18 U.S.C. § 3742(b). Appellee's contention is without merit. The approval requirement contained in 18 U.S.C. § 3742(b) is not a jurisdictional requirement. *United States v. Gonzalez*, 970 F.2d 1095, 1102 (2nd Cir.1992); *United States v. Hall*, 943 F.2d 39, 41 (11th Cir.1991); *United States v. Smith*, 910 F.2d 326, 328 (6th Cir.1990). Accordingly, this Court would not be divested of jurisdiction in this case even if the government failed to secure approval for its appeal as required by 18 U.S.C. § 3742(b).

five months' home detention, and two years' probation. The district court's downward departure was based upon the finding that Hendrickson demonstrated "extraordinary acceptance of responsibility." The district court's finding of extraordinary acceptance of responsibility was, in turn, based upon Hendrickson's payment immediately prior to his being sentenced of the entire $742,555 mandatory forfeiture he owed pursuant to the plea agreement. The government appeals the sentence imposed contending that the district court erred as a matter of law when it held that the payment of a statutory forfeiture can be a basis for a finding of extraordinary acceptance of responsibility. We agree. Therefore, Hendrickson's sentence is vacated, and this matter is remanded to the district court for resentencing.

I. Background

Hendrickson owns and operates Silver Towne, a precious metals and coin dealership, in Winchester, Indiana. Silver Towne is one of the largest coin dealerships in the nation and a leader in gold bullion sales. Hendrickson often attended trade shows as part of his business. At one such trade show, Hendrickson met a man named Robert McGuinn who purported to be a coin dealer. McGuinn purchased from Henderickson approximately $50,000 worth of gold for which McGuinn tendered cash. The cash was delivered to Hendrickson in a brown paper bag. This sale was the first of approximately eleven transactions which would occur between Silver Towne and McGuinn over the course of three months in early 1990. The transactions totaled approximately $1,094,745 consisting of eleven cash payments varying in size

between $28,000 and $140,000. Often times, the cash shipments from McGinn would arrive at Silver Towne in pails lined with garbage bags and would consist of currency of small denominations. Neither Hendrickson nor any Silver Towne employee filed the Internal Revenue Service ("IRS") Form 8300 as required by I.R.C. § 6050I (1986) for these cash transactions.

An IRS audit and investigation of Silver Towne in November 1990 revealed Silver Towne's failure to file the required Forms 8300 for the cash transactions involving McGuinn. In addition, as one might have suspected, it was later discovered that McGuinn was actually an agent for an international money laundering operation linked to a Colombian cocaine cartel.[2] Hendrickson was charged with eight counts of money laundering in violation of 18 U.S.C. § 1957 and eight counts of criminal forfeiture pursuant to 18 U.S.C. § 982. Subsequently, Hendrickson filed a petition to enter a plea of guilty, and the parties filed a memorandum of plea agreement. As part of the plea agreement, Hendrickson was required to pay a mandatory forfeiture of $742,555 pursuant to the provisions of 18 U.S.C. § 982. Following a hearing regarding Hendrickson's guilty plea and the plea agreement, the district court adjudged Hendrickson guilty.

A sentencing hearing for Hendrickson was convened by the district court. Just prior to the time the hearing was convened, Hendrickson tendered payment of the

---

[2] The government concedes that Hendrickson was not aware that the money used to pay for the gold was derived from the drug trade.

entire amount of the forfeiture. At the hearing, the district court adopted the findings of the presentence investigation report and, based upon an offense level of 18 and a criminal history category of I, found that the applicable guideline range for incarceration was twenty-seven to thirty-three months. However, in response to a motion by Hendrickson, the district court made a downward departure from the applicable guideline range based upon "extraordinary acceptance of responsibility as shown by the forfeiture of $742,555." The district court considered statutory forfeiture, unlike restitution where an offender is divested of property as a means of repayment to a victim, to be a genre of divestment which "is a payment that you have made basically to rectify the law that you committed [sic]." In making that distinction, the district court was aware that Hendrickson had not retained any of the proceeds of the money laundering transactions and that Hendrickson and Silver Towne had made on a profit of approximately $10,000 on the entire deal.

For the above reasons, the district court decided that the forfeiture was "extremely punitive and burdensome," and was "a matter that has not been adequately taken into account and could not have been adequately considered by the sentencing commission in formulating the guidelines." The district court reasoned that constructing the guideline ranges on the basis of the amount of money laundered without regard to the actual profit for the criminal exaggerates the harm. The district court found in Hendrickson's payment of the forfeiture in light of this exaggeration "truly extraordinary" particularly since Hendrickson "voluntarily" made immediate payment of the entire $742,555 which required him to liquidate some

of his assets. In addition, the district court noted the impact of such a large forfeiture upon both Hendrickson and Silver Towne, a business Hendrickson had spent a "lifetime" building. In the district court's view, extraordinary acceptance of responsibility was also implicated by the fact that Hendrickson had not challenged or otherwise contested the indictment which involved a relatively new offense with limited public awareness and compliance. Accordingly, the district court made a downward departure of six levels from the applicable guideline range and sentenced Hendrickson to five months' incarceration, five months' home detention, and two years' supervised release.

II. Analysis

Initially, Hendrickson argues that the government's appeal should be dismissed and this case remanded to the district court for a determination of whether the government's appeal constitutes a breach of the terms of the plea agreement entered into between Hendrickson and the government.[3] The bases for Hendrickson's argument are the doctrines of waiver and estoppel. Hendrickson contends that the language of the plea agreement waives the government's right to appeal the

---

[3] It is interesting to note that, although Hendrickson argued in his brief that this appeal must be dismissed because the government failed to demonstrate that it received the statutorily required approval for its appeal, he steadfastly maintained at oral argument that no approval was required for an effective waiver of the government's right to appeal.

sentence imposed in this case and that it would be "patently unfair" to enforce a waiver of the right to appeal against Hendrickson but not against the government. Hendrickson's contentions are without merit.

Hendrickson maintains that paragraphs five and seven of the plea agreement demonstrate that the government and Hendrickson intended to waive their respective rights to appeal the sentence imposed by the district court. Paragraphs five and seven state, in pertinent part:

> 5. The parties recognize that the Court may decide to depart from the Sentencing Guidelines pursuant to 18 U.S.C. § 3553(b) in which event the Defendant is still bound by his plea of guilty and neither party may withdraw from this plea agreement.
>
> 7. At sentencing, the Defendant is free to request any sentence he desires, including a request for a downward departure from the Sentencing Guideline determined by the Court.

The language contained in these paragraphs cannot properly be construed as a waiver of the right to appeal the sentence imposed by the district court. The waiver of the right to appeal must be express and unambiguous. *See United States v. Wiggins,* 905 F.2d 51 (4th Cir.1990). No clearly expressed intent to waive the right to appeal can be found in any provision of the plea agreement. The language cited by Hendrickson in paragraphs five and seven simply stands for the proposition that Hendrickson was free to seek a departure from the guideline range and neither party could withdraw from the plea agreement on the basis of the sentence imposed. As such, the express

language of the plea agreement does not demonstrate an intent by either Hendrickson or the government to waive their right to appeal the sentence imposed by the district court.

Hendrickson also argues that it was his understanding, given the circumstances surrounding the negotiation of the plea agreement, that both he and the government waived their rights to appeal the sentence imposed by the district court. This contention is directly contradicted by Hendrickson's own statements made at his change of plea hearing. First, on two occasions during the hearing, Hendrickson answered in the affirmative when asked by the district court if the plea agreement embodied the entire agreement between the government and himself. As we have already stated, nothing in the plea agreement could properly be construed as a waiver of the right to appeal by either the government or Hendrickson. Second, and most damning to Hendrickson's argument, the following discussion took place at the hearing:

> THE COURT: Mr. Neukam, while you're coming to the desk, let me tell the defendants that in waiving your right to appeal on the merits you are not waiving the right to appeal the sentence; that is an independent right, and you will retain that one.
>
> Do you understand that Leon?
>
> DEFENDANT LEON HENDRICKSON: Yes, your Honor.

It is clear from this discussion that Hendrickson fully understood that he retained the right to appeal the sentence imposed. By Hendrickson's own reasoning, it

would be "patently unfair" to interpret the plea agreement as allowing Hendrickson to retain the right to appeal the sentence imposed by the district court while finding that the government had waived its right to appeal.[4] Accordingly, the Court finds that neither Hendrickson nor the government waived their rights to appeal the sentence imposed by the district court.

In its appeal, the government argues that the district court erred when it found that the payment of a statutory forfeiture could be the basis for finding "extraordinary acceptance of responsibility" which would, in turn, justify a departure from the Guidelines. A district court is constrained to impose a sentence within the applicable guideline range unless the court "finds that there exists

---

[4] Had Hendrickson actually waived his appeal rights, his argument that the government also lost its appeal rights would find some level of support from cases decided in the Fourth Circuit. In *United States v. Guevara*, 941 F.2d 1299 (4th Cir.1991), the Fourth circuit held that when a defendant waives his right to appeal a sentence pursuant to a plea agreement, the government also will be found to have waived its right to appeal a sentence. The Fourth Circuit found this to be true even if the plea agreement contains an explicit waiver of the defendant's appeal rights and is devoid of any language which may be construed as a waiver by the government. The reasoning and holding in *Guevara* would seem to ignore the statutory authority given the Solicitor General to decide whether an appeal will or will not be taken in a particular case and require interpolation of a waiver provision on the basis of fairness. The question posed by *Guevara* is an open one in the Seventh Circuit. The present case however, does not require us to resolve the matter since Hendrickson did not waive his right to appeal the sentence imposed by the district court. As such, this question shall, for now, remain an open one in this Circuit.

an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *See also* U.S.S.G. § 5K2.0; *United States v. Frazier,* 979 F.2d 1227, 1229 (7th Cir.1992). In reviewing a district court's departure from the Guidelines, this Court employs a three-part test aided by the district court's explanations at the time of sentencing. *United States v. Gaddy,* 909 F.2d 196, 198-99 (7th Cir.1990). First, we must determine whether the district court has stated adequate grounds for the departure. This is a question of law and is reviewed *de novo. Id.* Second, we must determine whether the facts which underlie the grounds for the departure actually exist. This determination is reviewed using the clearly erroneous standard of review. *Id.* Third, we must determine whether the degree of departure is linked to the structure of the Guidelines. The district court's findings on what degree of departure is appropriate are given deference. *Id.* The district court departed from the Guidelines in this case based upon its finding that Hendrickson exhibited extraordinary acceptance of responsibility. This finding was, in turn, based upon Hendrickson's voluntary payment of the entire $742,555 mandatory forfeiture immediately prior to sentencing. Therefore, the question this Court must resolve is whether the payment of a mandatory forfeiture can ever be a proper ground for finding extraordinary acceptance

of responsibility. This is a question of law which requires *de novo* review.[5]

Initially, we find that the Sentencing Commission adequately considered both the possibility of statutory forfeiture and degree of hardship a forfeiture could work when constructing the Guidelines. Section 5E1.4 explicitly states that "[f]orfeiture is to be imposed upon a convicted defendant as provided by statute." As such, it is readily apparent that forfeiture was considered by the Sentencing commission and was intended to be imposed in addition to, not in lieu of, incarceration. *See United States v. Crook*, 9 F.3d 1422, 1426 (9th Cir.1993); *United States v. Shirk*, 981 F.2d 1382, 1397 (3rd Cir.1992), vacated and remanded on other grounds, ___ U.S. ___, 114 S.Ct. 873, 127 L.Ed.2d 70 (1994). The statute applicable in this case, 18 U.S.C. § 982(a)(1), provides for mandatory forfeiture of property in cases involving a conviction for money laundering. In addition, the "extremely punitive and burdensome" nature of forfeitures of the type imposed in this case was also considered by the Sentencing Commission. The assets to be forfeited by Hendrickson were identified pursuant to 18 U.S.C. § 982(b)(2). This subsection requires

---

[5] Hendrickson argues that a clearly erroneous standard should apply in this case. The clearly erroneous standard only applies to the review of the facts that underlie the grounds for the departure from the guidelines. Whether Hendrickson actually paid the entire amount of the forfeiture prior to sentencing is not disputed by the government. Rather, the government's appeal raises the issue of whether, as a matter of law, the payment of a mandatory forfeiture can ever be the basis for finding extraordinary acceptance of responsibility. As such, a *de novo* review is proper in this case.

the forfeiture of substitute assets when a defendant's money laundering activities exceed a specified dollar volume. Specifically, § 982(b)(2) states:

> The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

It is plain from the language of section 982(b)(2) that the onerous nature of forfeiture of substitute assets was considered by both Congress and the Sentencing Commission. Intermediaries, who do not retain the property laundered, but instead only reap a profit from their illicit transactions, are not subject to the substitute assets provision of § 982(b)(2) unless they exceed the $100,000 threshold established by the subsection. Thus, only intermediaries, such as Hendrickson, who are financially capable of laundering large amounts of property are required to forfeit substitute assets, and the possibility of an oppressively high forfeiture to profit ratio for such intermediaries plainly was contemplated. As such, an "extremely punitive and burdensome" forfeiture for certain intermediaries was explicitly contemplated by 18 U.S.C. § 982. Therefore, it is clear that both Congress and the Sentencing Commission were aware of the severity of the burden imposed by the forfeiture of substitute assets

and intended such a burden to be placed upon individuals such as Hendrickson.

Voluntary payment of restitution prior to adjudication of guilt can be a basis for finding acceptance of responsibility which would warrant a two level *reduction* in a defendant's offense level. U.S.S.G. § 3E1.1 Application Note 1(c). Neither the payment of restitution nor the payment of a statutorily mandated forfeiture can, in and of itself, be a ground for *departing* from the Guidelines.[6] *United States v. Bean*, 18 F.3d 1367 (7th Cir.1994); *United States v. Seacott*, 15 F.3d 1380, 1388-89 (7th Cir.1994); *United States v. Crook*, 9 F.3d at 1426; *United States v. Shirk*, 981 F.2d at 1397; *United States v. Carey*, 895 F.2d 318, 323 (7th Cir.1990). Several circuits however, including this one, have held that a sentencing court may *depart* from the Guidelines when the circumstances surrounding the payment of restitution demonstrate a degree of acceptance of responsibility that is truly extraordinary and substantially in excess of that which is ordinarily present. *United States v. Bean*, 18 F.3d 1367 (7th Cir.1994); *United States v. Brown*, 985 F.2d 478, 482-83 (9th Cir.1993); *United States v. Lieberman*, 971 F.2d 989, 996 (3rd Cir.1992); *United*

---

[6] Prompt payment of the forfeited amount does not transform forfeiture into a ground for departure from the guidelines. To hold otherwise would be tantamount to allowing the rich to "buy their way out of prison sentences." *United States v. Seacott*, 15 F.3d 1380 (7th Cir.1994). In addition, although Hendrickson argues that voluntarily paying a forfeited amount promptly saves the government time and expense, it can also be said that it is economically rational for a party required to pay a forfeiture to do so on a timely basis rather than incurring additional costs in what may ultimately prove to be a futile effort to forestall the inevitable.

States v. Garlick, 951 F.2d 161, 163 (8th Cir.1991); *United States v. Carey*, 895 F.2d at 323-24; *United States v. Davis*, 797 F.Supp. 672, 676-77 (N.D.Ind. 1992). Although courts have found that the voluntary payment of restitution may be a proper basis for a sentencing court finding extraordinary acceptance of responsibility, payment of a statutory forfeiture has not yet been found to be a proper basis for such a finding. *United Garlich*, 951 F.2d at 163; *Carey*, 895 F.2d at 323-24; *Davis*, 672 F.Supp. at 676-77. Therefore, we must decide whether payment of a mandatory forfeiture can ever be the basis for finding extraordinary acceptance of responsibility. We hold that it cannot.

It is the quality of voluntariness that forfeiture lacks which makes it unsuitable as a ground for finding extraordinary acceptance of responsibility. The very cornerstone for a finding of acceptance of responsibility and, therefore, a finding of extraordinary acceptance of responsibility must be the voluntary nature of the act or acts performed which underlie such a finding. Indeed, the nonexclusive considerations listed in U.S.S.G. § 3E1.1 Application Notes 1(a)-(g) either explicitly state or logically infer that the acts enumerated be of a voluntary nature. Interestingly, although "voluntary payment of restitution prior to the adjudication of guilt" is one consideration listed, payment of an amount subject to forfeiture is not listed. U.S.S.G. § 3E1.1 Application Note 1(c). The Ninth Circuit in *United States v. Crook* considered whether an extraordinary forfeiture could be the basis for finding extraordinary acceptance of responsibility. 9 F.3d 1422 (9th Cir.1993). In holding that it could not, the Ninth Circuit stated:

> We recently held in [citation omitted] that extraordinary restitution is a basis for downward departure only "to the extent it shows acceptance of responsibility." [citation omitted] Unlike extraordinary restitution, civil forfeiture is not a voluntary act which demonstrates acceptance of responsibility. Restitution is not, therefore, a viable analogy.

Id. at 1426. We are in agreement with the Ninth Circuit. Forfeiture is not a voluntary act and cannot be a ground for finding extraordinary acceptance of responsibility. Thus, the district court erred as a matter of law when it departed form the Guidelines based upon extraordinary acceptance of responsibility as shown by payment of the forfeiture by Hendrickson.

III. Conclusion

We conclude that the district court erred as a matter of law when it departed from the guideline range for incarceration grounded upon its finding of extraordinary acceptance of responsibility which was, in turn, based upon Hendrickson's payment of a mandatory forfeiture. Payment of a forfeiture mandated by statute is not voluntary and cannot be a ground for a finding of extraordinary acceptance of responsibility. As such, a departure from the guideline range for the reasons stated by the district court was not reasonable. Therefore, we VACATE Hendrickson's sentence and REMAND to the district court for resentencing consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 18, 1994

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. JOE BILLY MCDADE, District Judge*

UNITED STATES OF AMERICA *Plaintiff-Appellant,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianopolis Division.
No. 93-2981 v.	)	
LEON E. HENDRICKSON *Defendant-Appellee.*	)	No. IP 93 CR 35 Sarah Evans Barker, *Chief Judge.*

Order

Defendant-Appellee filed a petition for rehearing and suggestion of rehearing en banc on May 4, 1994. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

* Hon. Joe Billy McDade of the Central District of Illinois, sitting by designation.

APPENDIX C

No. 245a Modified (04/93) Sheet 1 –
Judgment in a Criminal Case

United States District Court

SOUTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA
V.

Leon Elvin Hendrickson
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After 11/1/87)

Case Number: IP 93-35-CR-01

Thomas W. Farlow
Defendant's Attorney

THE DEFENDANT:

[x] *Pleaded guilty to count(s)*
1 through 8 and 21 through 28.

[ ] *Was found guilty on count(s)* _____
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	*Nature of Of Offense*	*Date Offense Concluded*	*Count Number(s)*
18 U.S.C 1957	*Knowingly Engaging in a Financial Transaction in Criminally Derived Property in Excess of $10,000*	*04/19/90*	*1 - 8*

The defendant is sentenced as provided in pages 2 through 5 *of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984*

[ ] *The defendant has been found not guilty on count(s)* _____ *, and is discharged as to such count(s).*

[ ] *Count(s)* _____ *(is) (are) dismissed on the motion of the United States.*

[x] *It is ordered that the defendant shall pay to the United States a special assessment of* $400.00 *, for count(s)* 1 through 8 *, which shall be due* [x] *immediately* [ ] *as follows.*

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. No.: 305-24-8293

Defendant's Date of Birth: 10-05-26

Defendant's mailing address:

Rural Route 4

Winchester, IN 47394

Defendant's residence address:

Same as above

July 13, 1993
Date of Imposition of Sentence

/s/ Sarah Evans Barker
Signature of Judicial Officer

Honorable Sarah Evans Barker
U. S. District Court Judge
Name and Title of Judicial Officer

July 15, 1993
Date

Judgment–Page 2 *of* 5

Defendant: Leon Elvin Hendrickson
Case Number: IP 93-35-CR-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: 5 months on each of counts 1 through 8 to run cocurrent.

[x] *The Court makes the following recommendations to the Bureau of Prisons:* Designation to the Terre Haute Farm Camp.

[ ] *The defendant is remanded to the custody of the United States Marshal.*

[ ] *The defendant shall surrender to the United States Marshal for this district,*

a.m.
[ ] *at* _____ *p.m. on* _____.
[ ] *as notified by the Marshal.*

[x] *The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.*

[ ] *before 2:00 p.m. on* _____.

[x] *as notified by the United States Marshal.*

[ ] *as notified by the Probation Office.*

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ *to* _____ *at* _____ *with a certified copy of this Judgment.*

_____

United States Marshal

By _____

Deputy Marshal

Judgment – Page 3 *of* 5

Defendant: Leon Elvin Hendrickson
Case Number: IP 93-35-CR-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 2 years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shll comply with the standard conditions that have been adopted by this court

(set forth below). If this Judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] *The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.*

[ ] *The defendant shall pay any finds that remain unpaid at the commencement of the term of supervised release.*

1.) The defendant shall provide the probation officer with access to any requested financial information.

2.) The defendant shall provide public information regarding the cash reporting requirements of Internal Revenue Service Form 8300 as directed by the probation officer.

3.) The defendant shall participate in an electronic monitoring program under the supervision of the U.S. Probation Office for 5 months, and shall pay for the service.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment, the defendant shll not commit another Federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) *the defendant shall answer truthfully all inquiries by the probation officer and follow the instructiions of the probation officer;*

4) *the defendant shall support his or her dependents and meet other family responsibilities;*

5) *the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;*

6) *the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;*

7) *the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;*

8) *the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;*

9) *the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;*

10) *the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;*

11) *the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;*

12) *the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;*

13) *as directed by the probation officer, the defendant shall notify third party risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement;*

14) *the defendant shall not possess a firearm or destructive device.*

Judgment – Page 4 *of* 5

Defendant: Leon Elvin Hendrickson
Case Number: IP 93-35-CR-01

RESTITUTION AND FORFEITURE

RESTITUTION

[ ] *The defendant shall make restitution to the following persons in the following amounts:*

Name of Payee	**Amount of Restitution**

Payments of restitution are to be made to:

[ ] *the United States Attorney for transfer to the payee(s).*
[ ] *the United States District Court for transfer to the payee(s).*
[ ] *the payee(s).*

Restitution shall be paid:

[ ] *in full immediately.*
[ ] *in full not later than* _____.

[ ] *in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.*

[ ] *in installments according to the following schedule of payments:*

Any payment shall be divided proportionately among the payees names unless otherwise specified here.

FORFEITURE

[X] *the defendant is ordered to forfeit the following property to the United States:* $742,555.00

Judgment – Page 5 *of* 5

Defendant: Leon Elvin Hendrickson
Case Number: IP 93-35-CR-01

STATEMENT OF REASONS

[x] *The Court adopts the factual findings in the presentence report as the applicable guideline factors,*

OR

[ ] *The Court adopts the factual findings in the presentence report as to the applicable guideline factors except:*

(See attachments if necessary)

Guidelines Range as Determined by the Court:

Total Offense Level: _____
Criminal History Category: _____
Imprisonment Range: _____ to _____ months
Supervised Release Range: _____ to _____ years
Fine Range: $_____ to $_____
(plus $ 1,734.00 cost of imprisonment and $180.90 cost of supervision per month) _____
$_____ Restitution $_____ Special Assessment

[x] *Fine waived.*

[ ] *Sentence Imposed is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.*

[ ] *Because the width of the guideline range exceeds 24 months, the reason for selecting this particular point within the range is:*

[x] *The Court departs from the Guideline (See attachments if necessary)*

[ ] *upon the motion of the government, as a result of a defendant's substantial assistance.*

[x] *for the following reason(s): based on extraordinary acceptance of responsibility as shown by the forfeiture of $742,555.*

[ ] *Court orders transcript of Statement of Reasons to be attached.*

APPENDIX D

§ 5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from the described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g. as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in

this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

(Amended effective June 15, 1988; effective Nov. 1, 1990, 55 Fed Reg. 19205, May 8, 1990; 55 Fed. Reg. 42824, Oct. 23, 1990.)

APPENDIX E

§ 3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decreased by 1 additional level.

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to the following:

(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for

which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

(b) voluntary termination or withdrawal from criminal conduct or associations;

(c) voluntary payment of restitution prior to adjudication of guilt;

(d) voluntary surrender to authorities promptly after commission of offense;

(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(f) voluntary resignation from the office or position held during the commission of the offense;

(g) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

* * *

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this

reason, the determination of the sentencing judge is entitled to great deference on review.

* * *

(Amended effective Jan. 15, 1988; effective Nov. 1, 1989; effective Nov. 1, 1990, 55 Fed Reg. 19204, May 8, 1990; effective Nov. 1, 1992, 57 Fed. Reg. 20156, May 11, 1992)

APPENDIX F

§ 5E1.4. Forfeiture

Forfeiture is to be imposed upon a convicted defendant as provided by statute.

Commentary

Background: Forfeiture provisions exist in various statutes. For example, 18 U.S.C. § 3554 requires the court imposing a sentence under 18 U.S.C. § 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. § 1963 and 21 U.S.C. § 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offense.

In addition, the provisions of 18 U.S.C. §§ 3681-3682 authorizes the court, in certain circumstances, to order the forfeiture of a violent criminal's proceeds from the depiction of his crime in a book, movie, or other medium. Those sections authorize the deposit of proceeds in an escrow account in the Crime Victims Fund of the United States Treasury. The money is to remain available in the account for five years to satisfy claims brought against the defendant by the victim(s) of his offenses. At the end of the five-year period, the court may require that any proceeds remaining in the account be released from escrow and paid into the Fund. 13 U.S.C. § 3681(c)(2).

(Amended effective Nov. 1, 1989.)

APPENDIX G

§ 3742. Review of a sentence

(b) Appeal by the Government. The Government may file a notice of appeal in the district court for review of an otherwise final sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

* * *

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

* * *

(As amended Nov. 29, 1990, P.L. 101-647, Title XXXV, §§ 3401, 3503, 104 Stat. 4921).

APPENDIX H

§ 982. Criminal forfeiture

(a)(1) The court, in imposing sentence of a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

* * *

(b)(1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed –

(A) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853)

* * *

(2) The substitution of assets provisions of subsection 413(p) [21 USCS § 853(p)] shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, is committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

(Added Oct. 27, 1986, P. L. 99-570, Title I, Subtitle H, § 1366(a), 100 Stat. 3207-39; Nov. 18, 1988, P. L. 100-690, Title VI, Subtitle N, §§ 6463(c), 6464m 102 Stat. 4374, 4375; Aug. 9, 1989, P.L. 101-73, Title IX, Subtitle F, § 963(c), 193 Stat. 504; Nov. 29, 1990, P.S. 101-647, Title XIV, §§ 1401, 1403, Title XXV, Subtitle B, § 2525(b), 104 Stat. 4835, 4874; Oct. 6, 1992, P. L. 102-393, Title VI, § 638(e), 106 Stat. 1788; Oct. 25, 1992, P.L. 102-519, Title I, Subtitle A, § 104(b), 106 Stat. 3385; Oct. 28, 1992, P. L. 102-550, Title XV, Subtitle B, § 1512(c), 106 Stat. 4058.)

APPENDIX I

§ 853 Criminal forfeitures

(a) **Property subject to criminal forfeiture.** Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of this title (21 U.S.C. 848) [21 USCS § 848], the person shall forfeit, in addition to any property described in paragraph (2) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this title or title III, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part [21 USCS § 841, et seq.], a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

* * *

(p) If any of the property described in subsection (a), as a result of any act or omission of the defendant –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(Oct. 27, 1970, P.L. 91-513, Title II, Part D, § 413, as added Oct. 12, 1984, P.L. 98-473, Title II, Ch III, Part B, § 303 in part, 98 Stat. 2044; Oct. 12, 1984, P.L. 98-473, Title II, Ch XXIII, § 2301(d)-(f), 98 Stat. 2192; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle D, § 1153(b), Subtitle Q, § 1864, 100 Stat. 3207-13, 3207-54.)

APPENDIX J

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment of the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentences and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken in consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence an the applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

* * *

(Added Oct. 12, 1984, P. L. 98-473, Title II, Ch II, § 212(a)(2), 98 Stat. 1989; Oct. 27, 1986, P. L. 99-570, Title I, Subtitle A, § 1007(a), 100 Stat. 3207-7; Nov. 10, 1986, P. L. 99-646, §§8(a), 9(a), 80(a), 81(a), 100 Stat. 3593, 3619; Dec. 7, 1987, P. L. 100-182, §§3, 16(a), 17, 101 Stat. 1266, 1269, 1270; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle C, §7102, 102 Stat. 4416.)

APPENDIX K

18 USCS Appx ¶1A Sentencing Guidelines

CHAPTER ONE. INTRODUCTION AND GENERAL APPLICATION PRINCIPLES

PART A. INTRODUCTION

* * *

2. Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment; deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process. The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/$2500 taken." An offender characteristic category might be "offender with one prior conviction not resulting in imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow; the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines wee correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline arguments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission

is established as a permanent agency to monitor sentencing practices in the federal court.

* * *

[4](b) Departures. The sentencing statutes permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case. The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the

initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted. Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commissions' data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presences of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g. physical injury) may infrequently occur in connection with a particular crime (e.g. fraud). Such rare occurrences are precisely the type of events that the courts' departure power were designed to cover – unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances

in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to § 2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels. A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Park K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Park K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

* * *

(Amended effective Nov. 1, 1989; effective Nov. 1, 1990, 55 Fed. Reg. 19188, May 8, 1990; 55 Fed. Reg. 42824, Oct. 23, 1990; effective Nov. 1, 1992, 57 Fed. Reg. 20160, May 11, 1992.)